CASES AND AUTHORITIES CITED

	PAGE
Girouard Case, 328 U. S. 63	4, 5, 6
House Report 1710, 77th Congress, 2nd Session	5
Senate Report 1664, 77th Congress, 2nd Session	5
Summers, In re, 325 U. S. 561	3
Wiebe, Matter of, 82 F. Supp. 130	6
8 U. S. C.:	
Section 703a	2
Section 705	2
Section 706	2
Section 703, amended July 2, 1946	6
Section 721a, added July 2, 1946	6
Section 723, amended August 7, 1946	6
Section 724, amended July 2, 1946	6
Section 724a, added June 1, 1948	6
Section 727, amended May 16, 1947	6
Section 731, amended May 31, 1947	6
Section 732, amended May 31, 1947, and June 25 1948	6
Section 732a, added May 31, 1947	6
Sections 734 and 735, amended May 31, 1947	6
Section 739, amended July 23, 1947	6
50 U. S. C. App.:	
Section 454(a)	1
Section 456(j)	2

POOR COPY
BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

PETITIONER'S REPLY BRIEF

1. Before discussing the points made by the Government we desire to make a few additions to our original brief. In the first place, to the cases listed in the footnote on page 4 should be added that of Emily Shacklock, who was admitted to citizenship by Judge Fake in Newark, New Jersey, on January 19, 1950. We are informed that the Immigration and Naturalization Service did not oppose her application although, like petitioner, she refused to agree to serve in the armed forces as a non-combatant. We also think that among the statutes relevant to the intent of Congress the Court should consider 50 U. S. C. App. 454(a). This is the section which defines the persons to

whom the Selective Service Act shall apply. The part here relevant states:

> "Any citizen of a foreign country, who is not deferable or exempt from training and service under the provisions of this title (other than this subsection), shall be relieved from liability for training and service under this title if, prior to his induction into the armed forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President; but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States."

The significance of this provision is that an alien is declared disqualified from applying for citizenship *only after* he has sought all the deferments and exemptions under the law, one of which is deferment by reason of being a conscientious objector, opposed, as is petitioner, even to non-combatant service (see 50 U. S. C. App. 456(j), quoted at p. 15 of our original brief). Congress has thus indicated that a person is not disqualified from citizenship merely because he is a non-combatant conscientious objector but only if his contention that he is such is rejected and he then seeks to become exempted from the draft because he is an alien.

Finally we want to call attention to the provisions of the Nationality Act by which Congress has expressly excluded from citizenship persons falling within certain categories: 8 U. S. C. 703(a), which limits citizenship to persons of certain races and which in 1940 was even more restrictive than it is now; 8 U. S. C. 705, which excludes anarchists or advocates of the overthrow of the Government by force, advocates of assassination of officials, advocates of unlawful damage to property and advocates of sabotage, and also persons who are members of or affiliated with any organizations advocating such doctrines; 8 U. S. C. 706, which excludes draft evaders and deserters from the armed forces.

POOR COPY

BLEED THROUGH

Thus, when Congress wanted to exclude certain categories of aliens from the right to become citizens it knew how to do so in clear and unmistakable terms. Conscientious objectors, whether willing to serve in the military forces or not, have never been so specified.

2. There is no need to deal with the first point in the Government's brief (pp. 15-26) which discusses the Constitution. Petitioner is here claiming no constitutional privilege. He is asking only that a broad statute be not so construed as to penalize him for sincere adherence to his religious scruples. If Congress wants to exercise its constitutional power to accomplish this result, let Congress say so.

We cannot, however, let the discussion in the Government's brief (pp. 24-26, 38, 48, 67) of *In re Summers*, 325 U. S. 561, pass unnoticed. That case is here inapplicable for two reasons. In the first place its reasoning was based largely on the earlier decisions of this Court which we believe no longer represent its considered judgment. In the second place the Court was there concerned with the validity of state action challenged under the due process clause of the Fourth Amendment, not with the meaning of ambiguous, broad language in a Congressional enactment.

3. The Government in the first part of its second point begs the question. It assumes (p. 26) that petitioner is unwilling to assist the United States during time of war or emergency in any way whatever. Such are not the facts. In his preliminary examination petitioner said that he would do anything which was "beneficial in time of peace as in time of war" (R. 25). He has not objected to assisting in the war effort, but only to doing work which had no other function than destruction and killing. In fact he performed useful services in the vital field of agriculture (R. 25). In the light of these facts the discus-

COPY BOUND CLOSE IN CENTER

sion in the Government's brief and the authorities cited (pp. 27-33) are not pertinent and call for no specific comment.

4. It is, of course, true, as stated by the Government (pp. 34-37), that the Immigration and Naturalization Service has since 1923 assumed that it was proper to ask applicants for citizenship whether they were willing to bear arms and that this Court, twenty years ago, accepted the contention of the Service that a negative answer to such a question disqualified an application. We submit such is no longer the law.

We challenge the interpretation placed by the Government (pp. 38-45) on this Court's decision in the *Girouard* case. Since that case in fact dealt with a conscientious objector willing to perform non-combatant service, it was not inappropriate for the Court, in its opinion, to have stressed the value of such service in time of war. We believe, however, that this Court did not intend to limit itself to the precise situation which there existed. We believe, moreover, that the Court intended to overrule its earlier decisions, not merely to disagree with the "rule" laid down in those cases, as suggested by the Government (p. 41). For Mr. Justice Douglas, at 328 U. S. 63, said that while there were certain factual distinctions between the *Girouard* and the earlier cases "the principle emerging from the three cases obliterates any factual distinction among them".

The fear expressed by the Government (pp. 41, 42) that a reversal here would open the doors of citizenship to persons who might oppose our military enterprises, consort with a potential enemy, or affirmatively pursue a course of action opposed to the national interest, is without the slightest foundation. There is no possibility that a Court would find that such persons were attached to our Government. On the other hand, a person who, like petitioner, is willing to remove wounded from the battlefield and to assist in the vital area of food production, and whose sincerity is not questioned, should be eligible for citizenship.

POOR COPY

BLEED THROUGH

5. We come next to the Government's discussion (pp. 45-47) of the legislative history. Whatever may have been the reason for specifying non-combatant conscientious objectors as barred from the benefits of the special privileges available to veterans, it is perfectly clear that there would have been no necessity for doing so had Congress believed that they were barred by the general statute. While the various reports dealing with the special legislation (some of which are referred to in notes 27 and 31 of the Government's brief, pp. 45, 46) make no mention whatever of the subject of conscientious objectors, two of them contain language which may be relevant to the problem presented in this case.

Both House Report 1710 of the 77th Congress, 2nd Session [concerning HR 6439 which became 8 U. S. C. 1004] and Senate Report 1664 of the same Session [concerning HR 4167 which became 8 U. S. C. 723(a)] stressed the fact that the requirement of attachment to the Constitution and disposition to the "good order and happiness" of this country must still be proved by applicants. Evidently the framers of these Reports did not think that a person opposed to non-combatant military service was barred under the general requirements or else they would not have added the specific exclusion of this category from the legislation providing special benefits.

6. The last part of the second point in the Government's brief (pp. 47-57) is an attempt to reargue the question of statutory construction involved in the *Girouard* case and obtain the Court's present adherence to the views there expressed by the minority. In substance the argument is that since Congress refused to modify the law to change the result of the earlier cases, it must be deemed to have accepted them. Equally is it true that Congress has refused to amend the law after the repudiation of those earlier cases in the *Girouard* case [see legislation referred to in the Government's brief (p. 56)]. The Government suggests (p. 57) that this later inaction can be explained

COPY BOUND CLOSE IN CENTER

by the circumstance that general revision of the law is under consideration. But Congress has not hesitated to amend the sections dealing with naturalization in a considerable number of respects since the *Girouard* case was decided (see 8 U. S. C. § 703, amended July 2, 1946; § 721a, added July 2, 1946; § 723, amended August 7, 1946; § 724, amended July 2, 1946; § 724a, added June 1, 1948; § 727, amended May 16, 1947; § 731, amended May 31, 1947; § 732, amended May 31, 1947, and June 25, 1948; § 732a, added May 31, 1947; §§ 734 and 735, amended May 31, 1947; § 739, amended July 23, 1947).

While the Government (brief, p. 57) refers to the administrative interpretation that the effect of the *Girouard* case was limited to persons willing to serve as non-combatants, the federal judiciary, as already noted, reached a quite different conclusion. Particularly persuasive is the reasoning of Judge Delehant in *Matter of Wiebe*, 82 F. Supp. 130.

7. Finally, the Government argues (pp. 58-70) that petitioner has not brought himself within the law. This argument rests on the same fallacy we have already discussed concerning the nature of petitioner's views. There is no basis for the contention made by the Government (p. 60) that petitioner claims special naturalization status. On the contrary, he claims only that Congress has not deprived him of rights available to all because of any special views he may have had. Nor does he claim full equality with native-born Americans, as the Government suggests (pp. 64-65). He asks only that a general statute should not be so interpreted as to penalize aliens for views held by thousands of honorable native-born citizens.

While it is, of course, true, as the Government suggests (p. 69), that mere denial of citizenship does not deprive an alien of his freedom of expression or religion, it is perfectly evident that if this Court were to hold that aliens holding certain lawful opinions were ineligible to become

POOR COPY

BLEED THROUGH

citizens, the freedom of aliens to hold those opinions would be gravely restricted. Whenever the rights of any persons are limited because of their opinions, to that extent their freedom is curtailed even though those persons could not be punished for the direct expression of the views. In any case, a construction of the statute should be avoided which might in any degree restrict any of our great freedoms. If reasons of policy indicate a necessity for restricting the rights of aliens in such regard, the responsibility for such decision should be that of the Congress, not of this Court. Consequently the judgment appealed from should be reversed.

Respectfully submitted,

Osmond K. Fraenkel,
Attorney for Petitioner.

COPY BOUND CLOSE IN CENTER